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No. 95-358

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

GENE E. RICE, *et al.*,
Petitioners,
v.
RESOLUTION TRUST CORPORATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS PINNACLE WEST CAPITAL CORPORATION; BENJAMIN F. WILLIAMS; DAISY M. WILLIAMS; MORRISON F. WARREN; MARGARET WARREN; GEORGE E. LEONARD, JR.; MARY C. LEONARD; PETER C. BYRNE; BEVERLY BYRNE; MEL L. DECKER; CLARICE O. DECKER; HAYDEN C. HAYDEN; CATHERINE HAYDEN; DONALD S. JOHNSON; MARIAN E. JOHNSON; REGINALD T. MORRISON; CATHERINE G. MORRISON;

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QUESTIONS PRESENTED

1. Is it beyond the jurisdiction of a Federal District Court to issue an order approving a settlement and bar order barring claims over against an entity in consolidated civil actions, where:

(a) in all but one of the actions in which consideration is to be paid to plaintiffs that entity is a party (and in that action that entity executed a tolling agreement which caused it not to be joined as a defendant);

(b) the joinder of that entity in the only action in which it is not a party would not oust the District Court of jurisdiction;

(c) all the cases and their settlement are found to be "inextricably interrelated";

(d) the entity in question is subject to the jurisdiction of the court;

(e) the entity in question, either out of its own pocket or by paying the premiums on insurance, has been responsible for the entirety of the cash consideration paid to settle the consolidated cases; and

(f) that entity and the non-settling parties against whom the bar order runs participated fully in the settlement discussions and in the hearings on approval of the settlement?

2. Did the conduct of the settlement discussions in this case, or the positions taken by the Plaintiff RTC in connection with them, violate the procedural due process rights of the Petitioners or violate the Financial Institutions Reform, Recovery and Enforcement Act of 1989?

3. Did the courts below overlook any controlling provision of Arizona law in approving the settlement agreement or affirming that approval?

PARTIES AND CORPORATE AFFILIATES

A. *Rule 14.1(b)*

The Petitioners did not present a list of the Respondents (Appellees in the Court of Appeals) in this matter as required by Rule 14.1(b). The following entities and natural persons are Respondents:

The Resolution Trust Corporation, a federal agency and instrumentality created by the United States Congress, in its corporate capacity, in its capacity as receiver for and successor to MeraBank, A Federal Savings Bank, and in its capacity as receiver for and as successor to MeraBank Federal Savings Bank; Byrna Stepak, Hilda Schipper and Printing Management Services, Inc. Pension Plan (derivative plaintiffs); Pinnacle West Capital Corporation; Samuel Persky, Doris R. Morris, Bert Jordan, Jacqueline Jordan, Cecile Gould, and John Vertes (individually, and on behalf of the certified class); Keith L. Turley; Dorothy Rae Turley; Donald C. Heppermann; Karl Eller; Henry B. Sargent, Jr.; Claire Sargent; Pamela Grant; Daniel Cracchiolo; Richard Snell; Donald N. Soldwedel; Lou Edith Soldwedel; Maurice R. Tanner; Hazel H. Tanner; Douglas J. Wall; Mary A. Wall-Lambert; George E. Leonard, Jr.; Mary C. Leonard; Peter C. Byrne; Beverly Byrne; Mel L. Decker; Clarice O. Decker; Hayden C. Hayden; Catherine Hayden; Donald S. Johnson; Marian E. Johnson; Reginald T. Morrison; Catherine G. Morrison; Howard E. Kraft; Mary Ann Kraft; Gilberto I. Valdez; Gloria Ann Valdez; Dr. Morrison Warren; Margaret Warren; Jose Acosta; Aurora B. Acosta; Benjamin F. Williams; Daisy M. Williams; J. Darryl Lippincott; Betty Jo Lippincott; John R. Norton, III.

B. *Rule 29.6*

This brief is filed on behalf of all of the foregoing Respondents except the Resolution Trust Corporation.

The only Respondent on whose behalf this brief is filed which is a corporation is Pinnacle West Capital

Corporation. Pinnacle West Capital Corporation has no parent company, and its only corporate subsidiary which has stock in the hands of the public is Arizona Public Service Company.

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The above-named respondents oppose the grant of certiorari to review the judgment and opinion of the Court of Appeals for the Ninth Circuit in this matter. The opinion is reported at 51 F.3d 194 (1995).

STATEMENT

Petitioners (the "Non-Settlors") seek review of a unanimous judgment of the Court of Appeals affirming judgments of the District Court for the District of Arizona approving a global settlement as to ten consolidated lawsuits. The suits all involved the financial difficulties and receivership of MeraBank, a Federal Savings Bank ("MeraBank") which from 1986 was a wholly-owned subsidiary of Pinnacle West Capital Corporation ("Pinnacle West"). The global settlement, reached after lengthy negotiations in which the Non-Settlors participated, was approved at a hearing on December 29, 1993. (EOR 33-35; SEOR 4-9)[1] The judgments dismissed in their entirety two consolidated shareholder class actions alleging securities fraud, a shareholder derivative action against individuals, and six actions filed by six settling defendants against the Resolution Trust Corporation ("RTC"). The judgments also dismissed litigation initiated by the RTC as Receiver against various former officers and directors of MeraBank as to all defendants except the Non-Settlors. (*Id.*)

The Non-Settlors, Rice and Modzelewski, were two directors and officers of MeraBank who declined to agree to the settlement. They had each been executives of MeraBank for a number of years at the time of its acquisition by Pinnacle West. During the events at issue, Rice was MeraBank's Chairman of the Board and Chief Executive Officer. (EOR 1 at 9 ¶ 8(d)) From December 1986, following Pinnacle West's acquisition of MeraBank, to

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[1] Record references are as follows: "EOR" refers to the Appellants' [Non-Settlors'] Excerpts of Record in the Court of Appeals; "SEOR" to the Appellees' Supplemental Excerpts of Record; "CR" to the District Court Clerk's Record.

May 1990, Rice also was a director of Pinnacle West. (EOR 2 at 93 ¶ 6) At all relevant times, Modzelewski was a director and officer of MeraBank, and after June 1987 was its President. (EOR 3 at 181 ¶ 13)

As a condition to regulatory approval of Pinnacle West's acquisition of MeraBank in 1986, Pinnacle West entered into a "Capital Maintenance Stipulation" with the Federal Savings and Loan Insurance Corporation ("FSLIC") and the Federal Home Loan Bank Board ("FHLBB") to maintain the capital of MeraBank at specified levels as long as Pinnacle West controlled it, and, if necessary, to infuse additional equity capital into MeraBank. (EOR 4 at 371-72 ¶ 2.17)

The Securities Class Action Lawsuits.—MeraBank's declining financial condition was a substantial contributor to declining financial performance by its parent, and commencing on November 7, 1988, two securities class action lawsuits on behalf of purchasers of Pinnacle West stock (the "Class Actions") were filed in the District Court against Pinnacle West, Rice and ten other officers and directors of Pinnacle West, and were thereafter consolidated. The complaints alleged violations of the federal securities laws and various pendent claims. (EOR 40 at 1752, CR 1; EOR 1 at 3-5; SEOR 12, CR 1; EOR 40 at 1760, CR 89) On December 24, 1991, the District Court certified a class consisting of purchasers of Pinnacle West common stock between April 1, 1987 and October 7, 1988. (EOR 40 at 1777, CR 257) Substantial damages were claimed. (EOR 1 at 4-5 ¶ 1, 8 ¶ 7(d))

Pinnacle West's Additional Cash Infusion Into MeraBank.—In the Spring of 1989, the FHLBB demanded that Pinnacle West make capital infusions into MeraBank pursuant to the Capital Maintenance Stipulation. (*Id.* at 108 ¶ 37) Pinnacle West contested the FHLBB's authority to impose the additional capital requirements on MeraBank and challenged the validity and enforceability of the Capital Maintenance Stipulation. (EOR 27 at 770 ¶ 13) Fol-

lowing months of negotiations, on December 6, 1989, Pinnacle West and the Office of Thrift Supervision ("OTS")[2] entered into an agreement (the "OTS Agreement") to release Pinnacle West from any purported obligations under the Captial Maintenance Stipulation upon payment to MeraBank by Pinnacle West of approximately $450 million, plus accrued interest. (EOR 4 at 372 ¶ 2.17)

The Shareholder Derivative Action.—A few days later, four Pinnacle West shareholders initiated a derivative action (the "Derivative Action") in the District Court against Rice and nine other directors of Pinnacle West. (EOR 4 at 368 ¶ 2.9) The complaint alleged that Pinnacle West's directors breached their fiduciary duties and wasted corporate assets as a result of Pinnacle West's diversification and expansion program. (EOR 2 at 91 ¶ 1) The complaint focused on Pinnacle West's 1986 acquisition of MeraBank, and among other things alleged violations by Rice of Section 12(2) of the Securities Act of 1933 in connection with his sale of MeraBank stock to Pinnacle West incident to the acquisition. (*Id.* at 99-109 ¶¶ 21-39, 119-20 ¶¶ 52-54) Substantial damages were claimed. (EOR at 97-99 ¶¶ 15-20)

The RTC Steps In.—The next month, January 1990, MeraBank was put in receivership and the RTC was appointed Receiver. (EOR 4 at 370 ¶ 2.13) In March 1990, in accordance with the OTS Agreement, Pinnacle West delivered to the Receiver a cash payment of approximately $310.5 million and a promissory note of approximately $155 million. The OTS, the RTC, and the Federal Deposit Insurance Corporation ("FDIC") each issued releases in favor of Pinnacle West and others. (EOR 4 at 372 ¶ 2.17)

About a year later, the RTC brought suit in the right of MeraBank in the District Court against Rice,

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[2] The OTS had succeeded in August 1989 to the functions of the FHLBB.

Modzelewski and eighteen other former officers and directors of MeraBank and their spouses (the "RTC Action").[3] (EOR 41 at 1804, CR 1) The complaint in the RTC Action alleged that the defendants' mismanagement caused MeraBank certain specific losses, asserting, *inter alia*, various common law claims for negligence, gross negligence, breach of fiduciary duty and breach of contract. (EOR 3 at 295-306 ¶¶ 404-430) As amended, the complaint alleged damages in excess of $374 million. (EOR 3 at 346 ¶ 402)

Although Pinnacle West was not joined as a defendant in the RTC Action, the RTC asserted during the settlement proceedings subsequently conducted by the District Court that it had potential claims against Pinnacle West for compensatory damages arising from Pinnacle West's ownership of MeraBank commencing in 1986. (EOR 4 at 372 ¶ 2.18; Pet. A14-15) Pinnacle West vigorously objected to the RTC's assertions and contended that the RTC, the OTS and the FDIC had released Pinnacle West from any further claims by virtue of the OTS Agreement and Pinnacle West's payment of approximately $465.5 million to the RTC in March 1990, after the receivership had commenced, and by virtue of the releases then issued. (Pet. A15, A17) After negotiations, Pinnacle West and the RTC entered into a tolling agreement whereby all claims the RTC would have asserted against Pinnacle West in a complaint, together with all defenses Pinnacle West would have asserted against the RTC, were preserved. (Pet. A18-19) The District Court later concluded that "[w]ithout this agreement, Pinnacle West would have been made a party to the RTC Action." (*Id.* at A19)

The Compensation Lawsuits.—In early 1991, Rice, Modzelewski, and six other former directors of MeraBank

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[3] *Resolution Trust Corp.* v. *Gene E. Rice*, D. Ariz., No. 91-CV-634. The spouses were sued by reason of Arizona community property law, so that their interests in community property could be available to respond to the RTC's claims if liability were established.

who all were defendants in the RTC Action filed separate lawsuits against the RTC as Receiver (the "Compensation Suits") seeking payment of additional compensation relating to their service at MeraBank.[4] (EOR 4 at 373-74 ¶ 2.21; EOR 27 at 765 ¶ 2; EOR 28 at 774 ¶ 2)

The Settlement Proceedings.—In January 1992, the District Court entered orders in the Class Actions, the Derivative Action, and the RTC Action, appointing Judge Pamela A. Rymer[5] to serve as a settlement judge. (SEOR 1-3) The District Court stayed further proceedings in each of these actions pending the settlement negotiations. (*Id.*) The District Court's orders were entered on consent of all parties, including the Non-Settlors. (*Id.*)

Throughout 1992 and 1993, Judge Rymer conducted settlement conferences attended by counsel for the parties, including counsel for the Non-Settlors, and by representa-

[4] The Non-Settlors' claims were under "Salary Continuation Agreements" and "Employment Agreements" entered into with MeraBank in 1984. The bulk of the claims were under the "Salary Continuation Agreements" under which they were to continue to receive their salaries for ten years after termination of employment. *See* the description in *Modzelewski* v. *Resolution Trust Corp.*, 14 F.3d 1374, 1376-77 (9th Cir. 1994). Treble damages were also sought under Arizona statutory law by both Non-Settlors which, Rice claimed, had the effect of grossing his claim up to $17,132,634. *See* Complaint, Exhibit C, *Rice* v. *Resolution Trust Corp.*, Civ. 91-0062 PHXEHC, D. Ariz., Jan. 11, 1991; *see generally* that Complaint and the Complaint in *Modzelewski* v. *Resolution Trust Corp.*, Civ. 91-0064, PHXPGR, D. Ariz., Jan. 11, 1991. The Court of Appeals, in *Modzelewski* v. *Resolution Trust Corp.*, *supra*, affirmed a summary judgment against Modzelewski dismissing his Compensation Suit on the merits while reversing and remanding for further proceedings a summary judgment which had been entered against Rice in his. *See* Pet. B12 n.3.

[5] A Judge of the Court of Appeals, specially assigned to the District Court in the cases in question; she previously had served as a District Judge for the Central District of California until May 22, 1989.

tives of Pinnacle West's directors' and officers' liability insurers (the "D&O Insurers"). (EOR 26 at 738-39 ¶ 4; Pet. A6-7) Judge Rymer also met separately with several of the parties, including Non-Settlor Rice. (EOR 26 at 747-48 ¶ 20)

Throughout the settlement process, the Non-Settlors had, and exercised, the opportunity to participate fully in the negotiations. (Pet. A13-14) Counsel for the Non-Settlors attended numerous settlement conferences and were kept fully informed of the progress of the negotiations. (*Id.*) In addition, their counsel had the opportunity to review and comment on the settlement documents as they were being negotiated and drafted. (*Id.*) Peter K. Rosen ("Rosen"), counsel for the Non-Settlors in this Court, has acknowledged that he attended all the settlement discussions conducted before Judge Rymer during 1992 and 1993 which involved the settling defendants' counsel. (EOR 26 at 738-39 ¶ 4) Rosen was an active and informed participant in those proceedings. (EOR 30 at 1526-27 ¶ 5)

A Settlement Is Negotiated.—During the last half of 1992 and the first quarter of 1993, Judge Rymer presided over extensive negotiations with counsel for the D&O Insurers and Pinnacle West in an effort to marshal sufficient insurance proceeds and other funds to effectuate a global settlement of the Class Actions, the Derivative Action, and the RTC Action. (*See* EOR 26 at 738-39 ¶ 4) Throughout this period, Judge Rymer had lengthy discussions on numerous occasions with counsel for all the participants in the settlement proceedings. After months of vigorous negotiations, it became apparent that there might be difficulties associated with the applicable insurance coverage in light of the various defenses asserted by the D&O Insurers. (Pet. A15; EOR 26 at 741-42 ¶ 9) In early 1993, Judge Rymer advised counsel for the parties that the commitments obtained from the D&O Insurers fell short of the plaintiffs' aggregate settlement demands in the Class Actions, Derivative Action and RTC

Action. (EOR 31 at 1657 ¶ 6) Following further extensive negotiations, plaintiffs' counsel in the private suits agreed to make significant concessions in order to achieve a global settlement. (*Id.*)

In early March 1993, after additional negotiations, counsel for the RTC expressed a willingness to recommend to the RTC that it settle with all defendants in the RTC Action and Pinnacle West for a payment of not less than $25 million and execution by those defendants and Pinnacle West of mutual releases of all claims relating to MeraBank, including the claims against the receivership estate asserted in each of the Compensation Suits. (EOR 25 at 731 ¶ 3; Pet. A11-12) Under this settlement proposal, none of the individual defendants (including the Non-Settlors) would have been required to make any out-of-pocket payment. Thus, all the plaintiffs in the Compensation Suits, including the Non-Settlors, were offered the opportunity to settle on identical terms. (Pet. A19-20)

Rice Asks for "More."—Rice demanded that in addition to the RTC's releasing its claim against him, it should pay him $3 million in cash to settle his Compensation Suit. (EOR 26 at 744-45 ¶ 15) Although the RTC rejected Rice's demand, counsel for the RTC advised counsel for Rice that he would consider recommending to the RTC that the RTC consider a smaller payment to settle Rice's Compensation Suit. (*Id.*)

On March 8, 1993, Judge Rymer reconvened the settlement proceedings. (*Id.* at 745 ¶ 16) Counsel for all participants in the settlement process, including the Non-Settlors, attended all these proceedings, which extended through March 10, 1993. (*Id.*) During these proceedings, all the plaintiffs in the Compensation Suits, except the Non-Settlors, agreed to relinquish their claims against the RTC in exchange for the release and dismissal of all claims asserted by the RTC against them in the RTC Action. (Pet. A12-13, A16-17) Rice still refused to re-

linquish his claim. (EOR 26 at 747-48 ¶¶ 18-21; EOR 27 at 771 ¶ 16)

Based on Rice's position, Judge Rymer requested counsel for the RTC to consider a settlement structure under which the RTC would receive $25 million to settle its claims against the RTC Action defendants other than Rice, would remain exposed to Rice's claims for compensation, but would retain its claims against Rice. (EOR 31 at 1657 ¶ 7) After the D&O Insurers indicated that they would still be willing to fund the settlement on those terms, RTC counsel agreed to recommend them to the RTC. (*Id.* at 1657-68 ¶ 8)

On March 9, 1993, counsel for all the other individual defendants, including Modzelewski, agreed to recommend that their respective clients enter into an agreement to settle and dismiss the Class Actions, the Derivative Action, and their Compensation Suits and to settle and dismiss the RTC Action as to all defendants except Rice, at that time the only Non-Settlor. (EOR 26 at 746 ¶ 17)

On March 10, 1993, Judge Rymer met with Rice and his counsel in an attempt to achieve a full and complete settlement of the RTC Action. (*Id.* at 747-48 ¶ 20) For nearly two hours, Judge Rymer discussed with Rice his reasons for not agreeing to relinquish his claims against the RTC (*Id.*) Judge Rymer then emphasized the potential risks Rice faced if he did not settle, and she explained why she felt Rice should consider participating in the settlement. (*Id.*) Rice nevertheless declined to release his claims against the RTC unless he received cash compensation for them, and thus, he elected not to settle on those terms. (EOR 25 at 732 ¶ 4)

Settlement Papers Drafted.—Counsel for the settling parties and counsel for the D&O Insurers prepared a Memorandum of Understanding ("MOU") memorializing the main terms of the global settlement that they had agreed to recommend to their clients. (EOR 26 at 750-51 ¶ 25) The MOU was executed on or about March 19, 1993. (*Id.*). In early April 1993, counsel for

Modzelewski advised Judge Rymer in writing of Modzelewski's agreement to dismiss his Compensation Suit with prejudice and thus participate in the settlement, and his counsel executed the MOU. (Pet. A13, A20) Following the execution of the MOU, counsel for the Settling Parties drafted the Stipulation of Settlement and exhibits. (EOR 30 at 1527 ¶ 6, 1533-1654)[6]

"More" for Rice Is Discussed; Modzelewski Backs Out. —Prior to the settling parties' execution of the Stipulation, counsel for the RTC and counsel for Rice had continued discussions concerning a possible settlement of the litigation between their clients. (EOR 26 at 755-56 ¶¶ 35-38) During these negotiations, counsel for the RTC stated that he was prepared to recommend that the RTC attempt to achieve a completely global settlement (Modzelewski being on board at this time) by paying to Rice a set amount of consideration in the form of MeraBank receivership certificates to settle Rice's Compensation Suit. (EOR 31 at 1658 ¶ 11; EOR 26 at 756 ¶ 37) According to Rosen, Rice's counsel, there were increased offers of receivership certificates by the RTC's counsel and counteroffers by Rice at this time, as the District Court found. (EOR 26 at 756 ¶¶ 37-38; Pet. A20) The settlement negotiations between counsel for the RTC and counsel for Rice terminated without a settlement on September 23, 1993, when counsel for Modzelewski told Judge Rymer that Modzelewski was withdrawing from the settlement.[7] (EOR 26 at 756 ¶ 38; Pet. A13, A20)

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[6] Judge Rymer also conducted further settlement proceedings to finalize the settlement details. (EOR 30 at 1533-1654) Counsel for the Non-Settlors participated in these additional settlement proceedings and received copies of the draft and final versions of the Stipulation and exhibits. (*Id.*; Pet. A13-14)

[7] Judge Rymer specifically concluded that, throughout the settlement proceedings, the objective was to achieve a global settlement, and that "that objective was ultimately not achieved because the Nonsettling RTC Defendants concluded that their individual claims

Terms of the Global Settlement Stipulation.—The settling entities, including 42 settling defendants, executed the Stipulation as of November 24, 1993. (EOR 31 at 1658 ¶ 9) The Stipulation provides for payment of the aggregate principal amount of $61.625 million in respect of the Class Actions, the Derivative Action, and the RTC Action. (EOR 4 at 380-84 ¶¶ 3.1.3.4, 402-10 ¶¶ 7.3-7.5) Pinnacle West contributed $5.75 million to the settlement, and two of Pinnacle West's D&O Insurers contributed the remaining $55.875 million to the settlement. (*Id.* at 380-84 ¶¶ 3.1-3.4) A total of $34 million has been allocated to the settlement of the Class Actions, and the balance of $27.625 million has been deposited in a separate account available to the RTC Action and the Derivative Action. (*Id.*; Pet. A23-24) Of this latter sum, the principal amount of $25 million was allocated to the partial settlement of the RTC Action. (EOR 4 at 384-86 ¶ 3.3(b), 402-05 ¶ 7.3)

The Final Settlement Hearing.—On December 29, 1993, Judge Rymer conducted a final settlement hearing, and entered an order consolidating the Class Actions, the Derivative Action, the RTC Action, and the Compensation Suits (other than those filed by the Non-Settlors) pursuant to Fed. R. Civ. P. 42(a) for all purposes, including the implementation of the settlement. (EOR 32 at 1668-71) Judge Rymer approved the Stipulation and entered orders and final judgments dismissing the six settling directors' Compensation Suits, the Class Actions, and the Derivative Action as to all defendants, including Rice.[8] (EOR 33-34; EOR 40 at 1782-83, CR 324-29) In addition, Judge Rymer approved the partial settlement of the RTC Action, directed the entry of a final, immedi-

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for affirmative relief against the RTC were worth more than the RTC was willing to give up, and the RTC concluded the opposite . . . ." (Pet. A21-22)

[8] Modzelewski was not a defendant in the Class Actions or Derivative Action.

ately appealable judgment pursuant to Fed. R. Civ. P. 54(b), dismissing all claims asserted against all parties except the Non-Settlors, and entered an order barring the Non-Settlors from asserting certain claims by way of contribution or noncontractual[9] indemnity against the settling defendants in the RTC Action and Pinnacle West (the "bar order"). (EOR 35-36)

Proportionate Share Protection Granted.—The bar order barred the Non-Settlors from prosecuting any contribution or indemnification claims (other than those based on express contracts) against the parties participating in the settlement, including Pinnacle West. The Non-Settlors were, by the order, given the benefit of what the District Court called the "proportional rule," later to be applied by this Court in admiralty in *McDermott, Inc.* v. *AmClyde and River Don Castings, Ltd.*, 114 S. Ct. 1461 (1994) ("*AmClyde*").[10] Under that rule as applied here, any judgment "that the RTC may eventually be awarded against any Non-Settling RTC Defendants, or any other entities or persons, who are jointly and severally liable in tort to the RTC as joint tortfeasors with any or all of the RTC Settling Defendants, Mary C. Leonard[11] or Pinnacle West shall be reduced pursuant to the proportional rule judgment reduction method." (EOR 36 at 1692-93, ¶ 5)

The Court's Findings.—In approving the Stipulation and entering the bar order, Judge Rymer specifically concluded that there was no basis for the Non-Settlors to contend that the settlement was intended to injure their interests, or was structured to deprive the Non-Settlors of

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[9] The exception was, more precisely, for "claims based upon a specific written agreement of indemnity." (EOR 36 at 1692)

[10] In *AmClyde*, this Court called this method the "proportionate share" approach. 114 S. Ct. at 1466 and n.9. We will adopt this Court's terminology herein.

[11] Ms. Leonard was the ex-wife of a MeraBank director.

insurance coverage for the claims asserted by the RTC.[12] (Pet. A10-11, A21, A23-24) Judge Rymer thereafter entered findings of fact and conclusions of law determining, among other things, that the settlement of the Class Actions, the Derivative Action, the six of the Compensation Suits, and the partial settlement of the RTC Action were "inextricably interrelated." (Pet. A17) Judge Rymer further found that the global settlement was non-collusive and made in good faith and that the settlement consideration to be paid to the RTC was substantial, fair, and reasonable. (Pet. A24, A28-29, A43-46)

Judge Rymer specifically found that Pinnacle West was entitled to the protections afforded by the bar order. In determining that the settling defendants in the RTC Action and Pinnacle West were entitled to protection against the expense and burden of further claims and litigation pursuant to the bar order, Judge Rymer specifically found that "Pinnacle West has substantially facilitated and contributed to the settlement of these consolidated actions . . .", that it was a "critical party to the overall settlement of the consolidated actions," and that the global settlement "would not have occurred without Pinnacle West's contribution . . . ." (Pet. A17-18, A34) Judge Rymer also found that Pinnacle West contributed to the settlement by, among other things, funding the premium expenses for the D&O insurance policies, contributing $5.75 million to the settlement, and authorizing the payment made by the D&O insurers to be used, in part, to fund the settlement of the RTC Action. (Pet. A17-19)

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[12] Judge Rymer noted that Rice, in particular, benefited from the settlement, because at no personal expense he was being dismissed from the Class Actions and the Derivative Action in which he faced potential personal liability for substantial damages, including claims that were asserted solely against him in the Derivative Action for alleged securities fraud in connection with his sale of MeraBank stock. (Pet. A45)

The Court of Appeals Affirms.—The Non-Settlors appealed to the Court of Appeals.[13] That court affirmed unanimously. While noting that the case "involves a complex web of parties and lawsuits," the court found that, as to the issues raised by the Non-Settlors, "analysis is relatively straightforward." (Pet. B12) The Non-Settlors' claim that the settlement was not reached in good faith and unfairly prejudiced them was rejected, the court finding nothing in the record "that indicates the district court abused its discretion in finding the settling parties reached their agreement in good faith." (Pet. B13) The court also held that there was no evidence that the Non-Settlors were singled out for disparate treatment. (Pet. B13-14) The court commented that while the compensation claims of the two Non-Settlors were potentially more valuable than those of the individuals who settled, the worth of the claims was speculative, and that since the Non-Settlors "were among the highest ranking officers at Merabank, and therefore potentially subject to the greatest liability, they may have benefited more from the settlement than their settling counterparts, had they chosen to participate." (Pet. B14)[14]

The court also relied upon the fact that the District Court adopted the proportionate share rule, which limited any damage award which might be made against the Non-Settlors in the RTC Action by giving them a credit for the proportionate share of any fault of the settling entities (including Pinnacle West and the individuals) in causing the damage to the Receivership estate. (Pet.

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[13] Their appeals were from three judgments: (1) the judgment dismissing the Class Actions; (2) the judgment dismissing the Derivative Action; and (3) the judgment dismissing the claims asserted against the settling defendants in the RTC Action and imposing the bar order. (EOR 33-35)

[14] The court also commented that they derived benefit from the Settlement Agreement; Rice was dismissed from the Class Actions and Derivative Action, which sought substantial personal damages from him, at no personal expense. (Pet. B14 n.5)

B15) Thus, the Non-Settlors were not prejudiced since they were "left in the same position they would have been in if the other parties had not settled." The court accordingly upheld the "settlement process and result" as fair. (Pet. B16-17)

Finally, the court rejected two challenges by the Non-Settlors to the bar order. It found the inclusion of Pinnacle West under the bar order to be within the District Court's discretion since Pinnacle West was a critical participant in and contributor to the overall settlement, and in the light of the fact that the court applied the proportionate share offset rule. (Pet. B17-18) It also, referring with agreement to the conclusions of a number of other federal courts, rejected the proposition that a bar order upon a partial settlement could be made effective as against contribution claims but not against claims for noncontractual indemnification. It thus found it within the District Court's discretion to have included "non-contractual indemnity claims against the settling parties" as well as claims for contribution. (Pet. B18-19)[15]

Rice's Compensation Suit remains pending in the District Court,[16] as does the RTC Action to the extent it seeks recovery from the Non-Settlors.

REASONS FOR DENYING THE WRIT

The Non-Settlors urged before the Court of Appeals that the settlement unfairly prejudiced their interests and that the District Court should not have approved it. They repeat those arguments, under various rubrics and guises, before this Court. But the settlement, in which

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[15] The Non-Settlors' petition for rehearing and their suggestion for rehearing *en banc* were denied, no Judge of the Court of Appeals supporting either. (Pet. C2)

[16] As noted above, a summary judgment on the merits against Modzelewski in his Compensation Suit was affirmed by the Court of Appeals subsequent to the District Court's approval of the settlement agreement at issue in this case. *See* n.4, p. 6, above.

they were invited to participate on at least the same basis as the 42 other, settling defendants, simply left them where they would have stood had no party settled and the cases continued.[17] Under the "proportionate share" rule, subsequently endorsed in admiralty cases by this Court in *AmClyde*, to the extent that the Non-Settlors may be held liable to the RTC as Receiver in the ongoing litigation against them, they will be entitled to have the judgment reduced proportionately to reflect the relative degree of fault of the settling defendants—thereby obtaining the same benefits as they would have obtained from the equitable doctrines of contribution and indemnification. This approach is quite different from the "*pro tanto*" method employed in some cases, in which only a dollar-for-dollar credit for the settlement is made available against any judgment entered against the nonsettling defendants. *See AmClyde*, 114 S. Ct. at 1465-69. The cases principally relied on by the Non-Settlors before the Court of Appeals and in this Court involve settlements on a "*pro tanto*" offset basis.[18]

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[17] In fact, Rice was left in a better position; the Class Actions and the Derivative Action, in which he was a defendant, were completely dismissed as to all parties without any contribution whatsoever from him. Also, both Non-Settlors were benefited by the fact that the "proportionate share" bar order relieves them from the risk of the insolvency or other inability to respond of the other defendants in the case of a suit for contribution or equitable indemnification against them to the extent that such rights may otherwise have been available to them under applicable law. *See* n.29, p. 25, below.

[18] The principal such cases are *FDIC* v. *Geldermann, Inc.*, 975 F.2d 695 (10th Cir. 1992), and *In re NBW Commercial Paper Litig.*, 807 F. Supp. 801 (D.D.C. 1992). As this Court pointed out in *AmClyde*, the *"pro tanto"* method makes the amount paid in settlement by the original settling parties extremely important to the rights of the nonsettling parties, since they are barred from recovery over against the settling parties but may take credit against any judgment rendered against them only for the amount, on a dollar-for-dollar basis, paid by the settling parties. In the "proportionate share" rule, the amount paid in settlement by the

In this Court, the Non-Settlors urge: (1) That regardless of how close factually a nonparty may be connected with a particular litigation and settlement—such as by being a defendant in all but one of a number of cases settled on a consolidated basis; having contributed cash and having paid the premiums on insurance which collectively funded the entire cash cost of the settlement of all the consolidated cases; having appeared before the court in connection with the settlement proceedings as fully as if a party to all cases; having signed a tolling agreement to avoid being joined as a defendant in the only consolidated case in which it could have been a defendant but was not—there is still an absolute jurisdictional bar against a nonparty's receiving the benefit of the bar order traditional in partial settlements. (Pet. 13-19)[19] (2) When the RTC makes negotiation demands at the settlement table from a defendant, the party from whom the demands are made is entitled to the same protections as it would have at a criminal trial, including "notice, confrontation, jury trial, the requirement of proof beyond a reason-

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original settling parties is not of relevance to the nonsettling defendants. *See AmClyde*, 114 S. Ct. at 1463-67, 1469.

[19] Federal courts routinely approve partial settlements conditioned upon the entry of judicial bar orders. *See, e.g., AmClyde*, 114 S. Ct. at 1467; *In re Masters Mates & Pilots Pension Plan and IRAP Litig.*, 957 F.2d 1020 (2d Cir. 1992); *In re U.S. Oil and Gas Litig.*, 967 F.2d 489 (11th Cir. 1992); *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155 (4th Cir. 1991); *Franklin* v. *Kaypro Corp.*, 884 F.2d 1222 (9th Cir. 1989), *cert. denied*, 498 U.S. 890 (1990); *McDonald* v. *Union Carbide Corp.*, 734 F.2d 182 (5th Cir. 1984) (*per curiam*). The courts recognize that, without such bar orders, it would be difficult, if not impossible, to obtain partial settlements in multiparty cases where, as here, one or more of the defendants refuses to settle. *See, e.g., In re Masters Mates & Pilots*, 957 F.2d at 1028; *In re Nucorp Energy Sec. Litig.*, 661 F. Supp. 1403, 1408 (S.D. Cal. 1987), *quoted with approval in Franklin* v. *Kaypro Corp.*, 884 F.2d at 1229 ("Anyone foolish enough to settle without barring contribution is courting disaster. They are allowing the total damages from which their ultimate share will be derived to be determined in a trial where they are not even represented.").

able doubt and compulsory process" (Pet. 22-23) and that the RTC's making of a demand at the settlement table must be governed by the same statutory standards as those necessary in order to obtain an attachment or injunction. (Pet. 21-22) (3) That the Court of Appeals improperly applied federal law rather than Arizona law to certain matters concerning the entry of the bar order, although (a) the Court of Appeals did not say it was applying Federal law, (b) the District Court considered Arizona law in approving the settlement, (c) the Respondents cited Arizona cases to the Court of Appeals in support of the District Court's rulings on these matters, (d) Arizona courts have held that there are no noncontractual rights of indemnity between joint tortfeasors, and (e) in their Petition in this Court the Non-Settlors point to no Arizona authority contrary to the decision of the Court of Appeals and indeed cite no Arizona case law or statutes whatsoever. (Pet. 25-27)

None of these points warrants the exercise of this Court's reviewing authority and there is no conflict between the Circuits.

1. *The Jurisdiction of the District Court to Approve the Settlement, including the Bar Order.*—Apart from the six Compensation Suits which were dropped, Pinnacle West was a party to each and every one of the consolidated cases covered by the global settlement, except one, the RTC Action; as to that, it and the RTC had entered into a tolling agreement,[20] and the addition of Pinnacle West as a defendant would not have (as would the addition of a non-diverse party in a diversity suit) ousted the District Court from jurisdiction. Pinnacle West was subject to the processes of the District Court in Arizona,

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[20] The Non-Settlors conceded before the court below, as Judge Rymer indeed had found, that the RTC "would have named Pinnacle West [as a defendant in the RTC Action], but for the tolling agreement's suspending the statute of limitations." (Appellants' Br. 27-28; Pet. A18-19)

being an Arizona corporation. Pinnacle West and insurers under policies for which Pinnacle West had paid the premiums contributed all of the cash portion of the settlement. Pinnacle West appeared repeatedly before the District Court in the consolidated settlement proceedings and executed the settlement papers filed with the court. The consolidated cases, in all of which but one (apart from the Compensation Suits) Pinnacle West was a party defendant, all involved the financial difficulties that MeraBank found itself in during the late 1980s. The contention that entering a bar order in Pinnacle West's favor went beyond the jurisdiction of the District Court—which held that Pinnacle West was a "critical party to the overall settlement of the consolidated actions" and that settlement "would not have occurred without Pinnacle West's contributions"—is thus absurd and exalts form over substance; no serious argument is made to support it. *Kokkonen* v. *Guardian Life Ins. Co.*, 114 S. Ct. 1673 (1994), the Non-Settlors' principal reliance (Pet 13-14), is clearly not pertinent here. It simply held that where a federal court suit was settled through a private agreement followed by a dismissal with prejudice, and where the District Court had neither entered the private agreement as part of a consent decree or reserved jurisdiction over the performance of the agreement, a suit to enforce the settlement agreement could not be maintained in federal court without a fresh jurisdictional basis. *Kokkonen*, 114 S. Ct. at 1677. The present case does not involve a suit to enforce a settlement agreement, private or court-sanctioned, but rather the issue whether it was appropriate for a court to approve a consolidated settlement agreement that all of the parties to the consolidated cases, except the Non-Settlors, agreed upon in a case where all the parties to the settlement were before the court.

Not only is there no jurisdictional stricture against barring cross-claims against a nonparty that contributes to a settlement, but the District Court's jurisdiction and discretion were properly exercised here to enter a bar

order in favor of Pinnacle West, a principal contributor to the settlement, as the District Court's extensive findings (pages 11, 13, above; Pet. A17-19) make plain.

The decision in *FDIC* v. *Geldermann, Inc.*, 975 F.2d 695 (10th Cir. 1992), rejecting a particular settlement with a bar order in favor of nonparties, principally relied on by the Non-Settlors below and in this Court, is clearly distinguishable, as the Court of Appeals here held. (Pet. B17-18) *Geldermann* involved two suits by the FDIC as Receiver which while involving the same receivership estate were otherwise "unrelated." (975 F.2d at 696) There was no overlap between the defendants or claims in lawsuit "A" and lawsuit "B," but the defendants in lawsuit "A" had potential claims for contribution and indemnification against the persons who were defendants in lawsuit "B." The FDIC entered into a settlement with the defendants in lawsuit "B" and, as additional consideration to those defendants, agreed that a bar order precluding any claims for contribution and indemnification against them by the lawsuit "A" defendants was to be entered in lawsuit "A." This was to be done through the entry of an injunction in lawsuit "A" at the instance of the FDIC. (*Id.* at 696-97) The *"pro tanto"* judgment-sharing rule was to be employed; and the settlement agreement, and the order of the court entering the injunction in lawsuit "A," provided that only a stipulated fixed-dollar portion of the amount paid in settlement by the defendants in lawsuit "B" would be creditable against any judgment obtained by the FDIC against the defendants in lawsuit "A." That amount was determined purely by negotiation between the FDIC and the defendants in lawsuit "B." The Tenth Circuit, not unexpectedly, found that the FDIC was not the real party in interest to seek the injunction in lawsuit "A" and that the rights of the defendants in lawsuit "A" had been improperly bargained away by the FDIC in the settlement with the defendants in lawsuit "B." (*Id.* at 697-98) The record and the Tenth Circuit's discussion of it, illuminating an obviously

unfair and unilateral settlement, a lack of connection between the two cases, and an allocation of an arbitrary portion of the amount paid in settlement as a credit against any judgment obtained against the defendants in lawsuit "A," compounded by the use of the *pro tanto* method rather than the proportionate judgment method, clearly distinguish the outcome in the *Geldermann* case from the present one.[21]

2. *The Alleged Procedural Defects in the Settlement.*— The Non-Settlors contend (Pet. 19-24) that there were procedural defects in the settlement process, under the Due Process Clause (presumably of the Fifth Amendment) and under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"). These claims are without substance. The first claim (Pet. 19-20) is that Pinnacle West was not a party defendant to all of the consolidated lawsuits, and "as a matter of due process the court cannot adjudicate the rights of entities whose claims are not before the court." (Pet. 20) But the Non-Settlors were before the court. Moreover, apart from the six dismissed Compensation Suits, Pinnacle West was a party defendant in all of the consolidated cases except one; and both it, and the Non-Settlors, participated fully in the settlement discussions, the extended series of settlement conferences and hearings before the District Court, and in the final controversy and hearings as to whether the settlement agreement should be approved.[22] The District Court made the same sort of findings as to the settlement which would have been appropriate had Pinnacle West been a party to all of the consolidated lawsuits, and

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[21] The ruling in the *Geldermann* case was not "jurisdictional"; the Court's disposition of the appeal was not an order holding that the District Court had no jurisdiction but a remand of the injunctive bar order to it for further consideration, with a pointed suggestion that use of the *"pro tanto"* rule might not be appropriate. (975 F.2d at 699-700)

[22] The extensive procedural course of the negotiations is set forth in the Statement, pp. 6-13, above.

additional findings besides. Because one hundred percent of the cash contributed toward the consolidated settlement was paid by Pinnacle West and its insurers, it is hard to say that the settlement would or could have been any fairer had Pinnacle West been added as a party defendant to the RTC Action. The argument of the Non-Settlors here again exalts form above substance. The Non-Settlors were not deprived of any procedural right under the Due Process Clause.

Next, it is contended that if the RTC makes a demand that as part of a settlement a party give up a property right, such as a claim for compensation (an argument which would seem to also cover a demand for the payment of money) under FIRREA the demand must be subject to the same protections as would obtain in the case of the RTC's seeking an attachment or an injunction. (Pet. 20-24) It is irrational to say that a demand made in a settlement negotiation amounts to a "penalty," an "injunction" or an "attachment," as the Non-Settlors claim. (Pet. 21) The Non-Settlors were offered the same settlement terms as each of the other individual defendants.[23] While the compensation claims which they were asked to give up were, as claimed, larger than those of the other defendants, their larger responsibility and longer tenure might well be taken as an indication of potentially greater proportionate responsibility for the claims in connection with MeraBank's failure on which the RTC was suing, as the Court of Appeals observed.[24] (Pet. B13-14) Indeed, while the settlement was in fact offered on proportionate terms, that does not seem to be a requirement of due process or fair procedure (just as the argument

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[23] Indeed, there were negotiations by the RTC's counsel toward giving them better terms, but those proved unfruitful. *See* pp. 8, 10, above.

[24] The RTC asserted defenses against all the Compensation Suits and won its case against Modzelewski. The court below characterized Rice's claim and those of the others as "speculative." Pet. B13 & n.4.

made by the Non-Settlors does not seem to turn on whether the demand that they give up their compensation claim was proportionate to the similar demand on others or not). In any event, the short answer is that if the Non-Settlors did not like the RTC's demand, they were free to reject it—as they finally did. That they did not like the settlement is not a basis for overturning the settlement agreed to by the other 42 defendants. Neither the settlement nor the bar order affected the continuing rights of the Non-Settlors—they continued to prosecute their claims against the RTC for their unpaid salary continuation payments;[25] the RTC continues to assert its defenses; and the RTC continues to prosecute its affirmative claims against them. If they are held liable to the RTC, the judgment against them will be reduced equitably by the amount of the settling entities' proportionate fault, as it would had their claims of contribution and indemnification not been barred.[26]

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[25] As noted above, n.4, p. 6, Modzelewski's claim came to an end shortly after the settlement when the Court of Appeals affirmed a summary judgment against him on the merits of his claim. *See* Pet. B.12 n.3.

[26] As the District Court observed (Pet. A39 n.6), Arizona has abolished joint and several liability, both for torts involving personal and physical damage and those involving economic damage, with a few exceptions, none of which the District Court perceived as pertinent to the claims in the RTC Action. "Relative fault" took its place. (*Id.*; *see* Ariz. Rev. Stat. Ann. § 12-2506(A), (D); § 12-2501(G)). While Ariz. Rev. Stat. Ann. § 12-2504(1) provides for the use of the *"pro tanto"* method in the case of a partial settlement, the District Court observed, based on Arizona case law, that § 12-2504(1), enacted prior to the Act abolishing joint and several liability, did not apply to cases where joint and several liability does not exist and the regime of relative fault applies. (Pet. A39 n.6, citing *Roland* v. *Bernstein*, 828 P.2d 1237, 1238-39 (Ariz. App. 1991)). To the extent Arizona law is applicable to the RTC's claims under *O'Melveny & Myers* v. *FDIC*, 114 S. Ct. 2048 (1994), the Arizona law simply complements the effect of the bar order and "proportionate share" rule applied here.

3. *The "Arizona Law" contention.*—As a final point (Pet. 25-27), the Court of Appeals is said to have "improperly federalized Arizona common law on indemnity" in connection with the bar order. Yet (a) the District Court discussed Arizona law in reaching its decision to approve the settlement (Pet. A38-39, A43-44); (b) the Court of Appeals did not indicate whether it was applying federal or state law, apparently not having perceived any difference in result, since both sides briefed Arizona law;[27] and (c) the Non-Settlors have not cited any Arizona authority to this Court or made any showing to this Court that Arizona law required a different answer as to the imposition of a bar order resolving noncontractual indemnification claims[28] as well as contribution claims. The order barring noncontractual (hence "equitable") indemnification claims over against the settling parties as well as contribution claims is in accordance with holdings of a number of Courts of Appeals. *See In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 495 (11th Cir. 1992) (there is not "a shred of logic upon which [the Court] could base a principled distinction between bar orders against contribution, on the one hand, and orders against indemnity or so-called 'independent claims' on the other"); *In re Masters Mates & Pilots Pension Plan and IRAP Litig.*, 957 F.2d 1020, 1028 (2d Cir. 1992); *Associated Elec. Co-Op, Inc.* v. *Mid-America Transportation Co.*, 931 F.2d 1266, 1272 (8th Cir. 1991). No Arizona law to the contrary is brought forward by the Non-Settlors; they have neither cited any Arizona statute or case law establishing any noncontractual "equitable" right to indemnity on their part nor any Arizona law precluding a bar order from extinguishing any such supposed

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[27] *See* Appellants' Br. 32-35; Appellees' Br. 37-38.

[28] There is no basis for the statement at Pet. 10-11 that the settlement barred all indemnification claims; it only barred noncontractual indemnification claims, together with contribution claims. (*See* Pet. A37; *see* p. 12 and n.9 above)

right.[29] This point, like the other points, does not warrant this Court's attention.

* * * *

The settlement does not prejudice the rights of the Non-Settlors, leaving them no worse than where they would have been in the absence of a settlement and bar order, and in a position where they will not have to bear any greater burden as a result of any judgment against them than they would have had to bear had there been no settlement and any equitable rights of indemnification and contribution against the other defendants which they had, had not been barred. It left them in a position where they retained their compensation claims against the Receivership estate, subject to whatever defenses the Receiver had. The claims of lack of jurisdiction in the District Court, of deprivation of due process in the negotiation of the settlement, and of some undescribed neglect of pertinent Arizona case law, are meritless. None of them presents a conflict of authorities among the Circuits requiring this Court's attention.[30]

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[29] Indeed, it is well settled under Arizona law that "[g]enerally, there is no indemnity among joint tortfeasors." *Cella Barr Assocs., Inc.* v. *Cohen*, 868 P.2d 1063, 1068 (Ariz. App. 1994), citing *Shea* v. *Superior Court*, 150 Ariz. 271, 274, 723 P.2d 89, 92 (1986). Arizona courts have repeatedly stressed "[t]hat the party seeking indemnity must be free from any negligence (regardless of the nature of that negligence) contributing to the liability creating event." *Mountain States Tel. & Tel. Co.* v. *Corbin-Dykes Elec. Co.*, 559 P.2d 1067, 1069 (Ariz. App. 1976). The RTC is suing the Non-Settlors for their own alleged tortious conduct, including their own alleged acts and omissions of negligence and gross negligence. Under the proportionate share rule, the Non-Settlors cannot have any liability for the fault of any of the settling defendants, and they therefore can be held liable to the RTC only if and to the extent they are found to have engaged in their own "liability creating" conduct. Thus, the Non-Settlors cannot as a matter of Arizona law in any event have any noncontractual state-based indemnity claims against the settling defendants.

[30] The Non-Settlors, without specification, claim that the decision below conflicts with *In re San Juan Dupont Plaza Hotel Fire Litig.*,

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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45 F.3d 564, 568 (1st Cir. 1995) (Pet. 27). The entirety of that opinion, not simply the specific page cited, may be read without encountering any discussion or holding which touches on any of the issues involved in the present case.

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